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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION SEVEN

THE PEOPLE,

Plaintiff and Respondent,

v.

AVARO A. PEREZ,

Defendant and Appellant.

B219017

(Los Angeles County
Super. Ct. No. BA343688)

APPEAL from a judgment of the Superior Court of Los Angeles County,
Stephen A. Marcus, Judge. Affirmed as modified.

Mark D. Lenenberg, under appointment by the Court of Appeal, for Defendant and
Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant
Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Herbert S.
Tetef and David F. Glassman, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Avaro Perez was convicted of first degree murder and second degree robbery with firearm allegations found true. The trial court sentenced him to a term of 50 years to life. He appeals, claiming evidentiary and instructional error. In addition, he says and the People agree he is entitled to additional presentencing credit. The judgment is modified to give Perez an additional 11 days of presentencing credit. As modified, the judgment is affirmed.

FACTUAL AND PROCEDURAL SUMMARY

In early 2005, Manuel Hernandez (then 22) was out of work and needed money. He was on the street trying to sell his car when he met Avaro Perez. Perez said he made money buying and selling drugs and offered Hernandez the opportunity to work for him. Hernandez trusted Perez because they were from the same part of Mexico and began accompanying Perez to drug transactions. Perez would introduce Hernandez as his nephew and Hernandez called Perez “Uncle.” Sometimes Hernandez would get the drugs, sometimes he would get the money and sometimes he served as a lookout; Perez would give him money. Sometimes, instead of buying the drugs, Perez would steal them. On those occasions, Perez carried a gun.

On May 9, 2005, Perez and Hernandez met with Abel Lucero in front of his house on East 33rd Street in Los Angeles and made a deal to buy a kilo of cocaine from Lucero. Perez was to return the next day with \$15,000 for the drugs. Perez gave Lucero the number for the prepaid cell phone he and Hernandez used for their drug transactions, and Lucero provided his phone number.

The next day (May 10), a man Hernandez knew as “Mafia” drove Perez and Hernandez to Lucero’s house. On the way, there were several calls with Lucero on the phone Perez and Hernandez shared. They arrived at Lucero’s house at about 6:00 p.m. Perez had a gun and, for the first time, gave Hernandez a gun “to protect [Perez].” Hernandez put the gun in the back of his waistband. Hernandez never saw Perez with

any money. Perez told Hernandez “to be very careful with the gun so that, if anything were to happen,” Hernandez “should be ready.” Perez also told Mafia “to be ready,” and Mafia waited in the car with the engine running. Perez and Hernandez got out of the car and walked up the driveway at Lucero’s house.

Lucero came out from a bar behind the house to meet Perez and Hernandez. The three spoke at a pool table in the back while people played pool at another table further back. Another man approached and said he has “Nacho” (Ignacio Salazar), a friend of Lucero’s. Hernandez spoke with Nacho, commenting on a goat in the yard. Lucero walked toward Perez with what looked to Hernandez like a kilo of cocaine (wrapped in tape) and said, “This is good.” Perez said, “Okay, it’s fine,” and put the kilo inside his shirt on the right side. Lucero said, “Okay. Pay me.” Perez said, “Okay. I’ll pay you,” and reached inside the left side of his shirt, pulling out his gun and pointing it at Lucero. Perez said, “I’m not going to pay you[] so move because I’m going to kill you.” Lucero said, “No. Please don’t kill me. Just give me that [the drugs].”

When he saw Perez with his gun out, Hernandez pulled out the gun Perez had given him and pointed it at Salazar. Hernandez was shaking because he had never used a gun before and was scared. Lucero said, “Please give it to me. Give me the kilo.” Perez answered, “I’m not going to give you anything.” When Lucero reached for the drugs, Perez “grabbed [Lucero] by his neck, threw him back and fired the shot in his head, boom.” Shot in the forehead, Lucero dropped to the ground right away. Perez yelled for Hernandez to “Hurry up,” and Hernandez ran after Perez and they both jumped into the waiting car with its engine running. The car sped away. Holding the cocaine, Perez told the driver, “I told you I was going to take it from him. I told you.” They drove to a house where they met a man who gave Perez \$15,000 in exchange for the cocaine.

In the course of the police investigation, detectives subpoenaed Lucero’s phone records which led them to Hernandez, who was then arrested as a suspect in Lucero’s murder in September 2005.

Thereafter, Perez was charged with first degree murder (Pen. Code, § 187, subd. (a) [all undesignated statutory references are to the Penal Code]) and second degree robbery (§ 211) with firearm allegations (§ 12022.53, subds. (b)-(d)) as to both counts.

At trial, the People presented evidence of the facts summarized above. Hernandez as well as Ignacio Salazar and Lucero's son Dennis testified regarding the events surrounding Lucero's killing. In addition, Juan Gonzalez testified Perez, accompanied by Hernandez and another man, had stolen drugs from him around May 2005.¹ Perez met with Gonzalez and Hernandez at a restaurant in Irwindale. They referred to each other as "Uncle" and "Nephew." Perez wanted to know if Gonzalez would sell him a "pretty good amount" of methamphetamines. Perez provided Gonzalez with the cell phone number used in connection with the drug transaction involving Lucero. Gonzalez agreed to meet with Perez and Hernandez at a location in Los Angeles Perez specified. Gonzalez was directed to follow Hernandez to the location. Gonzalez was accompanied by two other men; they had no weapons—just the methamphetamines. After Gonzalez and the two men with him were directed into an apartment, Perez and another man followed them inside while Hernandez stayed outside.

Perez closed the door and took out a gun, directing Gonzalez and the two men to lie down on the floor. The other man with Perez had a gun too. Gonzalez was "very scared." Perez was supposed to pay \$4,000 or \$5,000. He had the money but took it back. Perez took the methamphetamines as well as money and a ring from Gonzalez. Perez and the men with him left. Gonzalez did not contact the police because he knew what he was doing was illegal. Gonzalez was contacted by a police detective in August 2005 and asked about the cell phone number. Gonzalez said it was the number he used to reach Perez. Initially, he said Perez had tried to find him (Gonzalez) a job, but later admitted the drug transaction. He identified both Perez and Hernandez in photographs.

¹ Gonzalez had a 2007 felony conviction for second degree burglary.

When he first spoke with police in September 2005, Hernandez testified, he had lied to police, telling them Mafia and Perez had dropped him off at a corner and he had not been at Lucero's house on the day of the crimes. He said he was "scared," it was the first "problem that [he had ever had] like that," he "knew that there was a death," and he didn't want to get involved. "It was wrong." Three days later, when police told Hernandez they didn't believe him, Hernandez said he had been on the driveway that day, he had a gun, and he saw Perez steal Lucero's drugs and kill him. He also told the detective that, "after Perez pulled his gun out and pointed at Lucero, . . . Lucero also had a gun." At that second police interview, Hernandez told police that after Perez said, "I'm going to kill you," Lucero said, "No, I'm going to kill you." It was not true that Lucero had a gun, but Perez had told Hernandez to say Lucero did, and Hernandez was afraid of Perez.

In August 2009, Hernandez agreed "to testify truthfully and completely" in the case against Perez "because [he] want[ed] to tell the truth." In exchange, he would be sentenced to a term of 19 years in state prison on his plea to the lesser charge of assault with a deadly weapon (instead of first degree murder and robbery). Perez was afraid. He knew it would be dangerous for him and knew he would be labeled an informant.

On the day Hernandez was brought out of custody to testify at Perez's trial, Perez was on the same Sheriff's Department bus. Perez told Hernandez if he testified against Perez, Perez would do something to his mother. Perez said his brother had gotten out of jail, had found Hernandez's mother and might have kidnapped her already.

The jury found Perez guilty of first degree murder and second degree robbery and found true all of the firearm allegations. The trial court sentenced Perez to a term of 25 years to life for first degree murder plus a consecutive term of 25 years to life for the personal discharge of a firearm causing death. The court imposed the upper term of five years for second degree robbery, but this sentence was stayed. (§ 654.)

Perez appeals.

DISCUSSION

Perez Has Failed to Demonstrate Prejudicial Error in the Trial Court's Admission of Evidence of His Commission of a Prior Robbery.

According to Perez, the trial court's admission of evidence of the Gonzalez robbery compels reversal. We disagree.

Evidence a defendant has committed acts other than the charged crimes is admissible to prove both intent and a common scheme or plan. (Evid. Code, § 1101, subd. (b).) The "least degree of similarity" between the uncharged act and the charged offense is required to prove intent. (*People v. Ewoldt* (1994) 7 Cal.4th 380, 402.) "[T]he recurrence of a similar result . . . tends (increasingly with each instance) to negative accident or inadvertence or self-defense or good faith or other innocent mental state, and tends to establish (provisionally, at least, though not certainly) the presence of the normal, i.e., criminal, intent accompanying such an act" (*Ibid.*, citation omitted.) To be admissible to prove intent, the uncharged misconduct must be sufficiently similar to support the inference the defendant "probably harbor[ed] the same intent in each instance." (*Ibid.*, citation omitted.) While a greater degree of similarity is required to establish the existence of a common design or plan, the "plan need not be unusual or distinctive; it need only exist to support the inference that the defendant employed that plan in committing the charged offense." (*Id.* at p. 403, citation omitted.)

In the robbery of Lucero, Perez followed a similar pattern in arranging a drug transaction but subsequently stealing the drugs at gunpoint, and the jury received a limiting instruction in this regard. The trial court did not err in admitting the evidence under Evidence Code section 1101, subdivision (b), or section 352. Moreover, in light of the evidence surrounding Lucero's murder and robbery, Perez was not prejudiced by the admission of this additional evidence. Most notably, when Perez got into the car after shooting Lucero, he told the driver, "I told you I was going to take it from him." Perez has failed to demonstrate prejudicial error.

Perez Has Failed to Demonstrate Prejudicial Error in the Trial Court’s Refusal to Instruct the Jury on a Sudden Quarrel or Heat of Passion Theory of Voluntary Manslaughter.

Perez says the trial court should have given the jury voluntary manslaughter instructions. We disagree.

“Although [Penal Code] section 192, subdivision (a), refers to “sudden quarrel or heat of passion,” the factor which distinguishes the “heat of passion” form of voluntary manslaughter from murder is provocation.’ (*People v. Lee* (1999) 20 Cal.4th 47, 59 [82 Cal. Rptr. 2d 625, 971 P.2d 1001]; see *People v. Rios* (2000) 23 Cal.4th 450, 461 [97 Cal. Rptr. 2d 512, 2 P.3d 1066] [certain mitigating circumstances will ‘reduce an intentional, unlawful killing from murder to voluntary manslaughter “by negating the element of malice”’ (italics omitted)]).) ‘The provocation which incites the defendant to homicidal conduct in the heat of passion must be caused by the victim [citation], or be conduct reasonably believed by the defendant to have been engaged in by the victim.’ (*People v. Lee, supra*, 20 Cal.4th at p. 59.) ‘[T]he victim must taunt the defendant or otherwise initiate the provocation.’ (*People v. Carasi* (2008) 44 Cal.4th 1263, 1306 [82 Cal. Rptr. 3d 265, 190 P.3d 616]; see *People v. Manriquez* (2005) 37 Cal.4th 547, 583–584 [36 Cal. Rptr. 3d 340, 123 P.3d 614] (*Manriquez*).) The “‘heat of passion must be such a passion as would naturally be aroused in the mind of an ordinarily reasonable person under the given facts and circumstances”’ (*People v. Steele* (2002) 27 Cal.4th 1230, 1252 [120 Cal. Rptr. 2d 432, 47 P.3d 225] (*Steele*).)” (*People v. Avila* (2009) 46 Cal.4th 680, 705-706.)

Even crediting Hernandez’s earlier statement to police that Lucero had a gun (because Perez had told him to say so and he was afraid of Perez), Hernandez also said Perez had already pointed his gun at Lucero and said he was going to kill him. As there was no substantial evidence of provocation justifying such an instruction, Perez was not entitled to a voluntary manslaughter instruction. There was no evidence of provocation that a reasonable jury could find persuasive. (*People v. Cunningham* (2001) 25 Cal.4th

926, 1008.) To the contrary, as summarized above, the evidence Perez was guilty of first degree murder was overwhelming.

Perez Has Failed to Establish Prejudicial Error in the Trial Court's Refusal to Instruct the Jury on Imperfect or Unreasonable Self-Defense.

Again, on this record, we reject Perez's contention that he, the initial aggressor, was entitled to instructions regarding imperfect self-defense, and he was not harmed by the absence of such an instruction in any event. (*People v. DeLeon* (1992) 10 Cal.App.4th 815, 825; *In re Christian S.* (1994) 7 Cal.4th 768, 783.)

The Trial Court Properly Refused to Instruct the Jury on Perfect Self-Defense.

For the reasons already addressed, even crediting Hernandez's earlier statement that Lucero had a gun, it was Perez who first pulled the gun on Lucero and said he was going to kill him. According to Hernandez's (and Gonzalez's) testimony, Perez arranged drug transactions and stole the drugs. Even if such an instruction had been given, it is not reasonably probable he would have obtained a more favorable result. (*People v. Breverman* (1998) 19 Cal.4th 142, 165; *People v. Watson* (1956) 46 Cal.2d 818, 836.)

As the People Concede, Perez Is Entitled to Additional Presentencing Credit.

Perez argues and the People agree Perez is entitled to an addition 11 days (for a total of 1411) of presentencing credit. (*People v. Bravo* (1990) 219 Cal.App.3d 729, 735; *People v. Wallkein* (1993) 14 Cal.App.4th 1401, 1411.) Accordingly, the matter is remanded to the trial court to make this correction and issue an amended abstract of judgment.

DISPOSITION

The matter is remanded to the trial court to issue an amended abstract of judgment reflecting Perez's 1411 (rather than 1400) days of presentencing credit. In all other respects, the judgment is affirmed.

WOODS, Acting P. J.

We concur:

ZELON, J.

JACKSON, J.